85-286

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PATRICK BEARY,

Petitioner,

– against –

WEST PUBLISHING COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether it was proper for the Court of Appealsfor the Second Circuit to rule that West Publishing Company was absolutely privileged in publishing a New York State judge's opinion, when said ruling conflicts with other decisions in the same circuit and other circuits, which hold that West only has absolute immunity in publishing the opinions of Federal judges.

2. Whether such ruling was in conflict with a New York Court of Appeals long standing decision that only the official State Reporter has absolute immunity.

3. Whether the imposition of double costs and damages against petitioner violated his First Amendment rights.

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No.

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1985

PATRICK BEARY

Petitioner

-against-

WEST PUBLISHING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Patrick Beary respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 23, 1985.

OPINION BELOW

The opinion of the Court of Appeals is reported at 763 F. 2d 66 (2d Cir.1985), and appears in the Appendix hereto. No opinion was rendered by the District

Court for the Eastern District of New York.

JURISDICTION

The judgment of the Court of Appeals was entered on May 23, 1985, whereby the judgment and order of the District Court dismissing appellant's libel action on the merits with prejudice pursuant to F.R.C.P. 12 and F.R.C.P. 56 was affirmed, with an award to appellee of double costs and $1000 damages against appellant pursuant to F.R.A.P. 38. Appellant on July 24, 1985, filed a motion with the Court of Appeals to disallow said costs and damages, but to date no decision has been rendered. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

New York Judiciary Law

Section 431 Causes to be reported

The law reporting bureau shall report every cause determined in the court of appeals and every cause determined in the

appellate divisions of the supreme court, unless otherwise directed by the court deciding the cause; and, in addition, any cause determined in any other court which the state reporter, with the approval of the court of appeals, considers worthy of being reported because of its usefulness as a precedent or its importance as a matter of public interest.

Each reported decision shall be published as soon as practicable after it is rendered.

Section 432 Copies of opinions, decisions and papers to be furnished to state reporter

With the exception of court of appeals and appellate division causes directed not to be reported, as provided in section four hundred thirty-one of this article, the judges or justices of every court of record, including surrogates, shall promptly cause to be delivered to the state reporter, without charge, a copy of every written opinion rendered in causes determined therein. The judges or justices of the court of appeals and of the appellate divisions and the appellate terms of the supreme court shall, in addition, cause to be delivered to the state reporter, without charge, a list of all decisions rendered by the respective courts, together with copies of such points of counsel and records and papers on appeal, if practicable, as the state reporter may require.

New York Civil Rights Law

Section 74 Privileges in action for libel

A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.

This section does not apply to a libel contained in any other matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of such a proceeding which was not a part thereof.

STATEMENT OF THE CASE

This libel action was commenced on August 6, 1984, in the United States District Court, Eastern District of New York, pursuant to 28 U.S.C. Sec. 1332 and the principle of diversity jurisdiction.

By order and judgment entered on October 31, 1984, District Court Judge I. Leo Glasser dismissed said suit "on the merits with prejudice" pursuant to F.R.C.P. 12 and F.R.C.P. 56. There was no opinion.

Beary appealed from said order and judgment to the United States Court of Appeals for the Second Circuit. The appeal was argued on April 11, 1985, and the Circuit Court on May 23, 1985, made a decision and judgment of affirmance, with an award to appellee of double costs and $1,000 damages against appellant.

Beary, who has appeared at all times pro se, based his libel action on an allegedly defamatory opinion by Civil Court Judge William D. Friedmann, published by West Publishing Company in its paperback Advance Sheet No. 35, New York Supplement, second series, in the issue of August 24, 1983, entitled Estates Roofing Co., Inc. v. Patrick Beary, 464 N.Y.S. 2d 951.

By letter dated September 1, 1983, Beary complained to West about such publication. Excerpts from said letter follow:

> After reciting that "The defendant does not contend that the repairs were not completed in a workmanlike manner" and "There is no dispute as to whether the work done by the plaintiff was completed and whether it was satisfactorily completed," Judge Friedmann went on to state that "The statute was enacted to protect the public and although the result appears to be unjust the law is the law," and concluded with "Compliance with the law is necessary and the Administrative Code is explicit in that the certificate with the address of the licensee is a must. Unfortunately, such an explicit provision cannot be relaxed although a party should be paid for his completed and satisfactory work as should the plaintiff before this Court."
>
> Judge Friedmann made pointed references to my being a "New York State attorney" and "an attorney of New York State" and practically accused me of using my "knowledge of the law" to unjustly deprive plaintiff of the balance due it. Apparently plaintiff's attorneys agree that said decision portrays me in an unfavorable light, because in their affirmation opposing my motion they assert that I used my "superior knowledge of the law" to evade my responsibility to pay the balance due their client.

When Beary wrote said letter, he was unaware that the judge on August 26 had denied his motion, made returnable on that same date, which motion sought to vacate

said decision and render a new decision, omitting the material which Beary claimed had the effect of defaming his reputation as an attorney.

District Court Judge Glasser dismissed Beary's libel complaint on the basis of West's "absolute immunity" under New York Civil Rights Law Sec. 74, without regard to the concomitant requirements of Secs. 431 and 432 of the Judiciary Law and irrespective of the inadequacy of West's motion papers.

The Circuit Court affirmed by decision and judgment dated May 23, 1985, notwithstanding the fact that heretofore West had been accorded "absolute immunity" only with respect to the publication of opinions of the Federal courts, whereas with regard to the publication of the opinions of New York State judges, West had never been granted more than "qualified immunity."

REASONS FOR GRANTING THE WRIT

1. SINCE THE RULING OF THE SECOND CIRCUIT THAT WEST PUBLISHING COMPANY WAS ABSOLUTELY PRIVILEGED IN PUBLISHING A NEW YORK STATE JUDGE'S OPINION CONFLICTS WITH OTHER DECISIONS IN THE SAME CIRCUIT AND OTHER CIRCUITS, WHICH HOLD THAT ONLY THE PUBLISHED OPINIONS BY WEST OF FEDERAL JUDGES, NOT STATE JUDGES, ARE ENTITLED TO ABSOLUTE IMMUNITY, A DETERMINATION BY THE SUPREME COURT IS NECESSARY TO ASSURE UNIFORMITY ON THIS ISSUE

The Second Circuit ruled that West, an unofficial reporter, was absolutely privileged in publishing Judge Friedmann's opinion. Referring to the New York Civil Rights Law, Judge Mansfield stated (A-6) that "Sec. 74 grants absolute immunity to the publisher of a true report of a New York state court judicial opinion, whether the reporter is classified as 'official' or 'unofficial'."

This is a marked departure from previous decisions of the same court and other courts, which uniformly have held that West, an unofficial reporter, is

entitled to absolute immunity only with respect to publication of the opinions of Federal court judges, not State judges.

Judge Mansfield, in support of his ruling, cited Lowenschuss v. West Publishing Co., 542 F. 2d 180 (3rd Cir.) and Garfield v. Palmieri, 297 F. 2d 526 (2d Cir.), cert. denied, 369 U.S. 871.

But in the Garfield case, at p. 527, the same Second Circuit held that "a federal judge is protected by an absolute privilege against civil liability for statements made by him in an opinion written by him," citing the "perceptive opinion" in the court below, reported at 193 F.Supp. 137, wherein the District Court judge in dismissing Garfield's complaint, found at p. 143 that "Judge Palmieri was acting well within the scope of his powers, duties and authority as a Federal Judge when he sent his opinion to West Publishing

Company in response to its request."

In publishing the opinions of Federal court judges under such circumstances, West's defense against a libel suit is well nigh impregnable, as further stated on p. 143:

> Such unfettered publication is a matter of public policy and outweighs and overrides any injury to an individual which might result from the application of such a rule.

The plaintiff in Lowenschuss v. West (supra) was the innocent victim of such "unfettered publication." A District Court judge refused to delete from his opinion a footnote accusing Lowenschuss of possible unprofessional conduct, even after the Bar Association informed the judge that the lawyer had not violated the Code of Professional Responsibility. As reported in 542 F. 2d at p. 182, "West thereupon felt obliged to publish the opinion as originally written and without editorial comment, as is its

unvarying practice," and the District Court judge's"refusal to cooperate in clearing Lowenschuss' professional reputation thus resulted in the printing of the offending footnote verbatim and without explanation in volume 367 of the Federal Supplement."

Because of the impregnable defense of "absolute immunity" West has with respect to its publication of Federal court decisions, Lowenschuss' libel complaint was dismissed under F.R.C.P. 12(b)(6).

Beary, however, whose professional reputation was allegedly similarly defamed by the publication by West of a New York state judge's opinion, should have been entitled to better treatment than was accorded his colleague Lowenschuss, since West as an unofficial publisher of the opinions of New York State judges was entitled only to "qualified," not "absolute" immunity.

See Lowenschuss v. West and Garfield v. Palmieri (supra), the very cases cited by the Second Circuit in its opinion in support of its ruling that West as such publisher of New York State judges opinions is now entitled to "absolute" immunity.

But see Sassower v. Finnerty, 96 App. Div. 2d 585 (2d Dept.), where the Court said at p. 587:

> ...the law of this State places upon each Judge an official duty to facilitate the publication of his opinion or decision in the official reports, all acts done in connection with the statutory duty fall within the scope of judicial immunity, though done maliciously or corruptly. However, a Judge is not immune from liability if he acts to procure the publication of his opinion in unofficial reports (see Murray v. Brancato, supra, p 57).

The Court also said on the same page, that an act to procure the publication of a judicial decision or opinion in the New York Law Journal is now a judicial act entitled to"absolute immunity."

The Law Journal had no such immunity in the days of Murray v. Brancato, as Judge Lehman noted at the bottom of p. 57 of said milestone decision.

Both West's New York Supplement and the New York Law Journal were then the unofficial reporters. The Law Journal has since gained the status of an "official" reporter under New York law, a standing which West's New York Supplement did not "attain" until the Circuit Court in its present ruling put the New York Supplement in the same class as the official State Reporter by granting it "absolute" immunity, thereby flouting the mandate of the Judiciary Law.

See Williams Press, Inc. v. Flavin, 35 N.Y. 2d 499, 506, which is the standard case in this regard although not cited by the Circuit Court in its opinion. There, the New York Court of Appeals ruled, as will be reiterated later in this

petition, that by reason of the Judiciary Law and "while there are private unofficial reporters, the publisher of the official reports enjoys a kind of exclusive franchise conferred by the State."

Beary had alleged in paragraph "15" of his complaint that the editors of the New York Law Journal, in which decisions such as Judge Friedmann's would ordinarly first appear, had rejected said opinion because of its obviously defamatory and biased content. Nothing was submitted to refute this allegation and Judge Friedmann evidently then sent the decision on to West, in derogation of the requirements of the Judiciary Law, as aforesaid. West practically concedes that this did happen, but claims "absolute immunity" by virtue of Civil Rights Law Sec. 74.

Of course, the New York Law Journal, as the official law newspaper and also as

part of the news media, is in a "different league" from law book publishers West and the State Reporter, and said Law Journal may publish judicial opinions in the first instance, without being bound by the same constraints of the Judiciary Law which apply to West Publishing Company and the State Reporter.

In Murray v. Brancato, 290 N.Y. 52, 57, Judge Lehman stated that "only by judicial legislation beyond the legitimate power of the courts" could "the immunity from liability created by law" be extended

While the Law Journal now has that immunity via Judiciary Law Sec. 91(1) and (2), the Circuit Court here has decided to give absolute immunity to West by judicial legislation beyond legitimate power of the courts to grant.

Judge Mansfield labeled Murray v. Brancato as "old," but that was no reason for a Federal court to cast it aside. (A-6)

2. IN CONTRAVENTION OF THE MANDATE IN ERIE R. CO. v. TOMPKINS THAT FEDERAL COURTS ARE NOT TO INTERFERE WITH THE STATUTORY LAWS AND COURT DECISIONS OF ANY STATE, THE CIRCUIT COURT HAS EVISCERATED SECS. 431 AND 432 OF THE NEW YORK STATE JUDICIARY LAW AND NULLIFIED MURRAY v. BRANCATO (290 N.Y. 52)

Not once, not in a single sentence did Judge Mansfield in writing the Circuit Court decision refer to the New York Judiciary Law, although Beary did argue in his brief, at p. 9, that it is well settled in New York that in order to qualify for an absolute privilege under Sec. 74 of the Civil Rights Law in publishing a judicial opinion, there must be compliance with the requirements of Secs. 431 and 432 of the Judiciary Law, which latter section mandates that the judges or justices of every court "shall promptly cause to be delivered to the state reporter, without charge, a copy of every written opinion rendered in causes determined therein."

The present case is devoid of any proof that Judge Friedmann ever complied with such mandate, although Beary did allege in his complaint, at paragraph numbered "13", that Judge Friedmann forwarded his defamatory opinion directly to West Publishing, as Judge Brancato did in Murray v. Brancato (290 N.Y. 52, 54).

Judge Mansfield in his decision stated (A-7): "Beary further argues that West is not entitled to Sec. 74 immunity because it received the Estate Roofing Co. opinion directly from Judge Friedmann rather than from the official New York State Reporter. We disagree."

Judge Mansfield apparently found no difficulty in disagreeing with appellant, notwithstanding that Judge Friedmann, in sending the opinion directly to West, violated the statutory requirements of Judiciary Law Sec. 432, as well as the ethical standards prescribed for him.

Judge Mansfield continued (A-7):
"For reasons already stated, since the published West report was 'fair and true' the route by which it reached West is immaterial."

That might very well be true if someone else had forwarded Judge Friedmann's decision to West because, unlike Judge Friedmann, the author of the decision, no one else has the official duty or obligation under Sec. 432 of the Judiciary Law to "promptly cause to be delivered to the state reporter" a copy of said written opinion.

Judge Mansfield's concession that even though Judge Friedmann sent his opinion directly to West, that unofficial reporter would certainly be entitled to "absolute immunity" under Civil Rights Law Sec. 74, seems to be adopted from the similar concession made by West in its brief to the Circuit Court, at the

bottom of p. 9, that "the present case is controlled by Civil Rights Law Sec. 74, which present New York law clearly recognizes confers an absolute privilege upon West for its publication, whether 'official' or 'unofficial,' of New York State judicial opinions from whomsoever received."

In receiving Judge Friedmann's decision directly from him and in publishing same prior to its publication by the official State Reporter as required by Judiciary Law Secs. 431 and 432, West must have known that it was cooperating with Judge Friedmann in violating the law.

West should not be allowed to benefit by its flouting the prescriptions of the Judiciary Law by having its heretofore status of "unofficial reporter" turned in effect into that of "official reporter."

If Judge Friedmann had complied with

the Judiciary Law and the official State Reporter had published his opinion in the first instance in its "Misc. 2d" reports, such publication would be entitled to absolute immunity.

But since in the words of Judge Lehman in Murray v. Brancato (supra), at p. 57 "a judge has no official duty in connection with any publication of opinions except in the official reports," publication by West of Judge Friedmann's decision did not entitle him or West to absolute immunity under Civil Rights Law Sec. 74.

As he stated in his oral decision dismissing Beary's complaint, District Court Judge Glasser evidently likewise believed that with respect to its being the first publisher of Judge Friedmann's decision, "West Publishing Company is quite clearly, absolutely privileged under Section 74 of the Civil Rights Law."

Judge Glasser apparently also believed, as shown in his oral decision, that if "Judge Friedmann's opinion was printed by New York Times," that newspaper would be entitled to judicial immunity under Sec. 74.

It seems that Judge Mansfield took the same position with respect to newspapers, because he cites a number of "newspaper" cases in his opinion (A-7), none of which pertain to a judge's official duty under the Judiciary Law to procure publication of his opinions in the official reports, namely:

Holy Spirit Association v. New York Times, 49 N.Y. 2d 63, which relates to the publication of three articles referring to intelligence documents, not judicial opinions, and therefore does not have relevancy to the instant case.

Gurda v. Orange County Publications Division, 81 App. Div. 2d 120, which also

has no relation to the present case, since the defendant there was charged with publishing not a judicial opinion, but a news article describing a lawsuit.

Nemerover v. Held, 54 App. Div. 2d 561, which had to do with publishing a transcript, not a judicial opinion.

In Keogh v. N.Y. Herald Tribune, 51 Misc. 2d 888, the Court said at pp. 892, 893:

> As to the first two causes of action, the court holds that the articles are not reports of a judicial or other official proceeding, and that the defense of absolute privilege under section 74 of the Civil Rights Law is therefore not available to defendants.

West succeeded in having the lower courts disregard the statutory law of New York, as well as the decisions of its Court of Appeals, contending in effect that the Court may exercise an independent judgment as to what the law of this State should be. That is

precisely what Judge Glasser did in dismissing Beary's complaint, whereby the District Court in effect ruled that Murray v. Brancato, 290 N.Y. 52, and Secs. 431 and 432 of the Judiciary Law no longer have any effect, and the Circuit Court affirmed that ruling, not mentioning the Judiciary Law at all in its decision, not even once.

The foregoing conclusions are warranted by reason of West's lower court argument that "dismissal of this action was required in any event under Civil Rights Law Sec. 74, no matter how or from whom West received the opinion," and that "it is unnecessary to address the viability of the common law doctrine enunciated in Murray v. Brancato because the present case is controlled by Civil Rights Law Sec. 74, which present New York law clearly recognizes confers an absolute privilege upon West for its

publication, whether 'official' or 'unofficial', of New York State judicial opinions from whomever received."

West contended that "Murray v. Brancato was wrongly decided and is in any event outmoded," and Judge Glasser seemed to be of same opinion. The Circuit Court joined in and concurred, in effect nullifying that landmark case in its opinion (A-6).

But in the Federal courts, except in matters governed by the United States Constitution or by Acts of Congress, the law to be applied in diversity cases is the law of the state.

There is no Federal general common law and where the State statute, as here, authorizes an action in the Federal court because of diversity of citizenship, the Federal court applies the substantive law of the state just as a state court within the same area would do.

See Erie Railroad Co. v. Tompkins, 304 U.S. 64, where the Court disapproved the oft-challenged doctrine of Swift v. Tyson, 41 U.S. 1, that the Federal courts need not follow the decisions of the courts in which the controversy arises but are free to exercise their own independent judgment, an outmoded doctrine which West would now have this Court revivify and follow.

The doom of Swift v. Tyson was foreshadowed by Mr. Justice Holmes in his dissenting opinion in Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518, where he condemned the "unconstitutional assumption of powers by the Courts of the United States" and said that it was "the duty of all Courts to bow, whatever their private opinions might be," to the statutory laws of a State and he "saw no reason why it should have less effect" when the State speaks "by its other voice," i.e., through the

decisions of its courts.

West was definitely mistaken when it argued that in both Lowenschuss v. West Publishing Co., 542 F. 2d 180, and Garfield v. Palmieri, 193 F. Supp. 137, "federal courts declined to follow Murray v. Brancato." However, West was correct in stating that Lowenschuss and Garfield both held that West is absolutely privileged "as an 'unofficial reporter' of federal court decisions."(underscoring added)

In the District Court and in the Circuit Court, Beary argued at great length to show that the foregoing cases cited by West have no bearing on the present case, since they relate to the "absolute privilege" conferred on West as a "semi-official" reporter of Federal cases, and not as an unofficial reporter of New York judicial opinions.

By reason of the Judiciary Law, and

"while there are private unofficial reporters, the publisher of the official reports enjoys a kind of exclusive franchise conferred by the State." Williams Press, Inc. v. Flavin, 35 N.Y. 2d 499, 506, which affirmed 44 App. Div. 2d 634, 637, where the Court indicated that private parties, like West which has no contract with the State, may not usurp the rights and duties of the official State Reporter:

> The obligation of providing the public with printed opinions of the courts is a public function over which the State, through the Reporter, retains ultimate control, and no private rights other than those specifically granted by contract accrue to private parties.

It would appear, therefore, that West has no rights at all and that only the official State Reporter may publish and distribute the opinions of New York judges, thereby giving him "absolute immunity."

3. CHANGING WEST'S IMMUNITY WITH RESPECT TO THE PUBLICATION OF NEW YORK JUDICIAL OPINIONS FROM "QUALIFIED" TO "ABSOLUTE" SHOULD HAVE BEEN RELEGATED TO THE TRIAL COURT

The case of Westmoreland v. CBS INC. 396 F. Supp. 1170, decided on Sept. 24, 1984, appears to be very much in point.

There Judge Leval, after noting that since the historic ruling of the Supreme Court in New York Times v. Sullivan, 376 U.S. 254, the press has enjoyed a "qualified immunity" with respect to publication of alleged falsehoods concerning public officials, went on to say, at p. 1171:

> CBS urges the court to go further and, as to high ranking officials, make the immunity absolute. CBS concedes there is no precedent giving direct support to its contentions. No case establishes such an immunity.

That is almost exactly what West is urging in the present case, to change from "qualified" to "absolute" its immunity with regard to the publication

of New York judicial opinions.

Judge Leval, at p. 1171, denied defendant's motion with leave to renew at the conclusion of the trial:

> I consider it inappropriate to rule in advance of trial on these novel contentions. The consideration of such far reaching changes in law, not only in the district court but in higher courts on review, is better based on the experience of a full trial record. Accordingly, these branches of defendants' motion are denied with leave to renew at the conclusion of trial.

The United States Supreme Court seems reluctant to give "absolute immunity" to high Federal officials. In June, 1985, it rejected the argument that the U.S. Attorney General is absolutely immune from suit for violating an individual's rights in the name of national security.

The Court adopted, instead, the "qualified immunity" test for other high officials and applied it to the Attorney General.

See Mitchell v. Forsyth, 472 U.S.__,

86 L Ed 2d 411, 105 S Ct __, where Justice White said, at p. 423:

> We emphasize that the denial of absolute immunity will not leave the Attorney General at the mercy of litigants with frivolous and vexations complaints. Under the standard of qualified immunity articulated in Harlow v. Fitzgerald, supra, the Attorney General will be entitled to immunity so long as his actions do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 US, at 818, 73 L Ed 2d 396, 102 S Ct 2727. This standard will not allow the Attorney General to carry out his national security functions wholly free from concern for his personal liability; he may on occasion have to pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States. But this is precisely the point of the Harlow standard: "Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he should be made to hesitate...." Id., at 819, 73 L Ed 2d 396, 102 S Ct 2727 (emphasis added).

In Lowenschuss v. West Publishing Co., 542 F. 2d 180, as previously shown herein, West, because it realized it had "absolute immunity," did not "hesitate" to publish the defamatory footnote

concerning the plaintiff, albeit West knew that said attorney had been exonerated of all professional wrongdoing by the Bar Association, thereby ruining with impunity said plaintiff's reputation for all time.

In McDonald v. Smith, 472 U S __, 86 L Ed 2d 384, 105 S Ct __, the Supreme Court also rejected the concept of "absolute immunity," for communications to Government officials.

The question was whether the First Amendment right "to petition the Government for a redress of grievances" gave "absolute" protection against a suit for libel for anything that was written in a letter to the President and other officials concerning a candidate seeking appointment to public office.

The United States Court of Appeals for the Fourth Circuit had ruled that the petition clause provided only qualified,

not absolute immunity, and the Justices of the Supreme Court unanimously upheld that ruling. That West has "absolute immunity" as a Federal reporter but only "qualified immunity" as a reporter of State judges' opinions is shown in Garfield v. Palmieri, 193 F. Supp. 137, 144:

> The case of Murray v. Brancato ... has no application here. The New York law which it lays down is quite different from the law formulated by the federal courts which governs this case.

The following from Sheridan v. Crisona, 14 N.Y. 2d 108, 114, is also relevant:

> See, also, Murray v. Brancato, 290 N.Y. 52, 56-57 (wherein the court stated that Judges procuring publication of opinions in the Official Reports are entitled to judicial privilege, since such publication is directed by statute).

To have "absolute privilege" under the provisions of Sec. 74 of New York's Civil Rights Law, West must comply with the Judiciary Law.

4. THE CIRCUIT COURT SHOULD NOT HAVE CONSIDERED THE MINNESOTA STATUTE AS GRANTING ABSOLUTE PRIVILEGE TO WEST'S REPORTING OF JUDGE FRIEDMANN'S DECISION

In a footnote to its opinion (A-7), the Circuit Court with reference to Civil Rights Law Sec. 74, stated that "Minnesota, where West's reports are published, likewise grants an absolute privilege to reports of judicial proceedings," citing the Minnesota statute.

But it is submitted that said Court should not have considered the Minnesota statute, since it has been held that in determining a motion for summary judgment under Rule 56, statements in a memorandum of points of law and authorities cannot be made the basis for the deposition of such a motion. See Sardo v. McGrath, 196 F. 2d 20, 23, where the Court so held. West never pleaded such statute.

5. IT APPEARING THAT BEARY HAS ACTED AT ALL TIMES IN GOOD FAITH AND WITHOUT DELAY, THE IMPOSITION OF SANCTIONS UNDER F.R.A.P. 38 AGAINST HIM WAS AN UNCONSTITUTIONAL ABRIDGMENT OF HIS FIRST AMENDMENT RIGHTS; MOREOVER, BEARY'S TYPE OF SITUATION WAS NOT CONTEMPLATED BY SAID RULE 38

In the opening paragraph of West's brief before the Circuit Court, counsel made this argument:

> This frivolous appeal stems from a New York State court judge's opinion which held appellant Patrick Beary not liable to a roofing contractor for the sum of $656. Presumably Mr. Beary liked the court's result, but he did not like its opinion, which he claims defamed him.

West's counsel made the foregoing statement in an apparent effort to persuade the Circuit Court into believing that although Beary benefited from a dismissal of the $656 suit against him, he nonetheless saw fit to bring a libel suit against West, and that therefore an appeal from the District Court's dismissal of said suit should be deemed "frivolous."

This strategy evidently succeeded,

since the Circuit Court agreed that Beary's appeal was indeed "frivolous."

West's counsel neglected to inform the Court, however, that in his libel complaint, Beary alleged that a motion was made before Judge Friedmann to vacate his defamatory decision and render a new decision, omitting the offensive statements, which motion was denied by Judge Friedmann "on the merits," for the following reason: "This Court cannot be the subject of threats or intimidation."

In denying the motion, Judge Friedmann also denied the other branch of said motion whereby Beary sought to vacate a default judgment which had been wrongfully entered against him on October 29, 1980, after his answer had been timely served and filed. He was thus left in the anomalous position of having a default judgment on record against him in the sum of $825.34 involving the very same cause

of action which Judge Friedmann had dismissed in his favor!

In view of the foregoing, it can hardly be said that Beary has been"unjustly enriched" by reason of Judge Friedmann's dismissal of the action against him, and that part of his decision indicating that Estates Roofing Co. should still "be paid" by Beary is really incredible in its absurdity and downright injustice. Yet, West's counsel in its brief asserted that this is a proper case for an award of damages under F.R.A.P. 38 because Beary's libel action "was a transparent effort to embarrass a judge."

Even though the Circuit Court's opinion indicates otherwise, Judge Friedmann never made an order eliminating Beary's name from his decision and substituting "Homeowner" instead. Beary contends that such substitution did not wipe out or justify or retract the libel contained in

Judge Friedmann's decision as published in the paperback edition which was widely circulated, just as the author of a letter, defaming an individual and spread far and wide, would not be excused from the initial libel just because he later published a book containing a copy of the letter, from which the libeled person's name had been deleted.

Judge Friedmann in his decision made repeated, pointed references to Beary's profession as a "New York attorney" and as "an attorney of New York State," the plain intendment of the decision being that appellant used "his knowledge of the law" to unjustly deprive Estates Roofing Co. of the balance due, a totally baseless charge.

Judge Friedmann's constant reference to the fact that Beary was an attorney ran through his decision like a virulent stream, and it reminded one of Antony's

oration at Caesar's funeral, whereby he stirred the people to fury against the conspirators by repeating over and over again that "Brutus is an honorable man."

The late renowned N.Y.U. law Professor Edmond Cahn in "The Sense of Injustice," pp. 11-15, wrote that that which is unfair has the effect of arousing the sense of injustice in men, who become "outraged and furious," and those include "the humble and illiterate, the drawers of water and hewers of wood," who "can hate injustice with a burning hatred."

In his "Justice for All," at p. 45, Benjamin Masse, S.J., citing Genesis 3:19, laments "how displeasing it must be to God to see human labor unjustly compensated," and according to the Prophet Amos (8:4-10), the Lord has promised those guilty of such injustice to turn their "feasts into mourning" and all their "songs into lamentation."

But West's counsel apparently convinced Judge Glasser that in writing that "the result appears to be unjust," Judge Friedmann was not referring to Beary at all but, as contended on the last page of West's District Court brief, "if Judge Friedmann was of the view that the provision of the New York City Administrative Code barring recovery by an unlicensed contractor required him to reach an unjust result in the case before him, that surely was a comment on the wisdom of the legislators who enacted the provision rather than upon Mr. Beary."

It is submitted that counsel was stretching credulity to the breaking point in making the foregoing argument because, after all, who could be against a statutory requirement that would mandate the licensing of all contractors as a means of eliminating home improvement fraud? And no one would disagree with

the warning issued by the U.S. Department of Justice through the Queens County District Attorney's office that even the repairing of "a leaky roof" can become "an economic nightmare," because an alarming number of those in the home improvement business "use lies and deception to defraud millions of dollars from unsuspecting consumers every year."

It is submitted that Judge Friedmann's statements in his decision, taken in their natural meaning attribute to Beary a lack of moral qualifications, credibility and integrity as an attorney at law and that an ordinary reader of the decision would infer from Judge Friedmann's remarks the meaning appellant has placed on them and that they were directed at Beary, and not at the legislators who enacted the statute requiring contractors engaged in the home improvement business to be licensed.

BEARY AT ALL TIMES ACTED IN GOOD FAITH

In Beary's main brief submitted to the Circuit Court appears the following:

> The source of some of the material in this brief is E. Sussman and A. Sussman, "Motions to Dismiss Can Be Big Winners -- Or Big Losers," Legal Times of New York, Jan. 1985, p.6.

The above named "E. Sussman" is Edna R. Sussman, described in said article as "a partner at White & Case," who are the attorneys of record for West Publishing Co. On p. 23 of said article the authors, citing Fed. R. Civ. P. Rule 12(b) and CPLR 3211(e), state:

> Under both federal and state rules, any motion to dismiss must be made before answering the complaint...

Beary appeared pro se and although he is an attorney,his practice for the most part has been limited to the New York State courts and he has never previously appeared pro se or represented a client in the Federal courts in a civil matter. Under New York practice, it was his

understanding that by serving an answer, a defendant waives his right to move to dismiss the complaint and, relying on the Sussman article, he believed the practice was the same in the Federal courts.

If he was wrong, the procedure he followed should not be regarded as "frivolous," since it appears that he was "misled" as to the law by a legal article written by a member of the same law firm representing West. Beary's same good faith with respect to West's motion for summary judgment is demonstrated by the following excerpts from Beary's memorandum of law submitted in the District Court:

> West in seeking the granting of summary judgment at this time is relying on its said answer and the arguments in support of same contained in West's memorandum of law. However, since Mr. Ginnow's affidavit, which is the only affidavit in support of said motion, is sworn to August 30, 1984, and antedates the date of the answer, which is September 4, 1984, it is submitted that said answer, including the affirmative

> defenses contained therein, should not be considered by this Court in support of West's motion seeking summary judgment. (underscoring added)
>
> It should be noted with respect to Mr. Ginnow's said affidavit, as aforesaid, that it should be disregarded and accorded no probative value, since it is replete with conclusory statements and lacking in evidentiary facts. Mr. Ginnow, as Vice President of West, evidently is without personal knowledge of the facts.

On the other hand, Beary's affidavit in opposition was replete with evidentiary facts, even though in view of the insufficiency of the moving affidavit, there was no need to controvert Mr. Ginnow's conclusory allegations, including his hearsay version of the meaning of the number "3990" alluded to in Circuit Court's opinion (A-7), which version that Court accepted without any further, independent proof.

Attorneys and litigants should not be inhibited in pressing novel issues or in urging a position that can be supported

for an extension, modification or reversal of existing law. Nelson v. Piedmont Aviation, Inc., 750 F. 2d 1234, 1238.

The California Supreme Court (In re Marriage of Flaherty, 31 Cal. 3d 637, 650) has held as follows with reference to a "frivolous" appeal:

> ...an appeal should be held to be frivolous only when it is prosecuted for an improper motive-- to harass the respondent or delay the effect of an adverse judgment-- or when it indisputably has no merit-- when any reasonable attorney would agree that the appeal is totally and completely without merit.

Federal decisions express the concept similarly, finding an appeal to be "frivolous" when "the result is obvious and the arguments of error are wholly without merit." Gattuso v. Pecorella, 733 F. 2d 709, 710.

In the light of these principles, it appears that an appellate court may only sanction the attorneys appearing before it if those attorneys pursue and argue

appeals which they know are frivolous, or act with reckless disregard as to whether the appeal is frivolous. An appellate court must have proof that the attorneys were subjectively aware that the appeal was baseless, harassing, vexatious, or otherwise improper, before it can impose sanctions.

This Court, it has been held, must "make an independent examination of the whole record", Edwards v. South Carolina, 372 U.S. 229, 235 (1963), to establish whether the sanctions imposed in this matter meet this constitutional standard.

In a decision relating to F.R.C.P. 11, as amended effective August 1, 1983, the plaintiff had alleged a Sec. 1983 cause of action against his wife and various justices of the New York Supreme Court arising from relief awarded to the wife in a divorce proceeding. The Court granted defendants' motion to dismiss but

refused to impose sanctions against plaintiff's attorney for what it characterized as an "extremely tenuous" view of the law, stating:

> ...the vigorousness displayed by plaintiff's attorney in opposition to this motion indicates to me that although destined to fail from a legal standpoint, this action was not commenced in bad faith. Thus I do not conclude that this type of situation was contemplated in the amendment to Rule 11 and application for sanctions is denied. (Williams v.Birzon,576 F. Supp. 577)

In similar fashion, Beary has resisted West's dismissal motion with equal vigor, as attested to by briefs submitted by him to the District Court and the Circuit Court and his oral arguments before both tribunals. At no time has he sought to delay the progress of the litigation or the appeal. All he wanted was his day in court and a fair and speedy trial of the issues. Beary respectfully submits that his type of situation was not contemplated in F.R.A.P. 38, under which rule the

Circuit Court awarded double costs and $1,000 damages against him.

Considering the magnitude and the importance of the Circuit Court's novel ruling, it is ironic that said Court should also use its decision as a vehicle to impose double costs and $1,000 damages against Beary "in view of the complete frivolousness of this appeal"(A-8).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

Patrick Beary

PATRICK BEARY
Petitioner Pro Se
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Jamaica, N.Y. 11432
(718) 526-4100

August 15, 1985

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 927 — August Term, 1984

(Argued: April 11, 1985 Decided: May 23, 1985)

Docket No. 84-7965

PATRICK BEARY,

Plaintiff-Appellant,

—against—

WEST PUBLISHING COMPANY,

Defendant-Appellee.

Before:

MANSFIELD, KEARSE and PRATT, *Circuit Judges.*

Appeal from an order and judgment of the Eastern District of New York, I. Leo Glasser, *Judge*, granting defendant's motion for summary judgment dismissing a libel action based on defendant's publication of an opinion filed by Judge William D. Friedmann of the Civil Court of the City of New York.

Affirmed with an award of double costs and damages.

PATRICK BEARY, Esq., Jamaica, NY, *Appellant Pro Se.*

LAURA B. HOGUET, Esq., New York, NY (White & Case, New York, NY, of counsel), *for Appellee.*

MANSFIELD, *Circuit Judge:*

Patrick Beary, an attorney, appeals from an order and judgment of the Eastern District of New York, I. Leo Glasser, *Judge*, granting defendant's motion for summary judgment dismissing Beary's diversity libel action for $5,000,000 damages based on defendant's publication of an opinion authored by Judge William D. Friedmann of the Civil Court of the City of New York. We affirm.

The alleged libelous decision giving rise to the present federal suit was rendered in Beary's favor in a Civil Court action by Estates Roofing Co., Inc., against Beary for a balance of $656 due on a home improvement contract for roof repairs to his house. Upon Beary's motion at the close of the plaintiff's evidence in that case Judge Friedmann dismissed the suit on the ground that the roofer who performed the work was not licensed in accordance with New York City's Administrative Code, § 773.11.0. In his opinion, as filed and forwarded to the New York State Reporter, Judge Freidmann noted that Beary, an attorney, had correctly stated the law to be that a person not properly licensed as a roofer could not collect the balance of the agreed-upon price for roof repairs and that "although the result appears to be unjust the law is the law." Judge Freidmann further stated that Beary did "not contend that the repairs were not completed in a work manlike [sic] manner" and that the statutory requirement that the roofer possess a proper license "cannot be relaxed although a party should be paid for his com-

pleted and satisfactory work as should the palintiff [sic] [Estate Roofing Co., Inc.] before this Court."

The Friedmann opinion was forwarded to the New York State Reporter, which sent it to West Publishing Company ("West"), the defendant in this action, which on August 24, 1983, published it as received (with the correction of a single typographical error) in its paperbound Advance Sheet edition. Beary then moved to vacate Judge Friedmann's opinion and asked West to withhold publication of the opinion in bound volumes, contending that it gratuitously portrayed him, a lawyer, in an unfavorable light as a "dead beat" who had used a legal technicality to avoid a payment due. He claimed that, if Judge Friedmann had not decided the case on the legal ground, he would have shown that Estates Roofing Co. had been guilty of poor workmanship.

Judge Friedmann denied Beary's motion to vacate the opinion but requested the New York State Reporter to eliminate Beary's name from the opinion, which was done by substituting "Homeowner" for "Beary." By letter dated November 7, 1983, the New York State Reporter advised West of Judge Freidmann's order. Thereafter, both the official bound New York State report, *see* 121 Misc.2d 279, and the bound West report, *see* 464 N.Y.S.2d 951, published the opinion with "Homeowner" as the defendant and without any mention of Beary.

Notwithstanding this background, on August 6, 1984, Beary filed the present federal action claiming that West's paperback Advance Sheet copy of the Freidmann opinion was libelous and defamatory since it falsely and maliciously represented him, a lawyer, as "conniving, contemptible, a swindler, trickster, deceiver, a 'deadbeat' and a 'shyster' and a person to be avoided, shunned and dis-

trusted, that by reason of his 'knowledge of the law,' Beary tricked and deceived the Estates Roofing Company out of hundreds of dollars". It alleged that there was no factual basis for the opinion's statements that the satisfactory completion of the roofing work was undisputed and that the roofer should be paid for his completed and satisfactory work. The complaint further alleged that West was negligent in publishing the Advance Sheet edition of the opinion.

Judge Glasser in open court granted West's motion for summary judgment on the grounds that Judge Friedmann's opinion was not defamatory and that in any event West was "absolutely privileged under Section 74 of the Civil Rights Law." From this decision Beary appeals.

DISCUSSION

Beary's initial contention, that West by filing an answer waived its right to move to dismiss the complaint or, in the alternative, for summary judgment must be rejected out of hand as frivolous. Although Fed. R. Civ. P. 12(b) encourages the responsive pleader to file a motion to dismiss before pleading, nothing in the rule prohibits the filing of a motion to dismiss with an answer and Fed. R. Civ. P. 56(b) expressly authorizes a party to file a motion for summary judgment "at any time." A plaintiff is not prejudiced by the filing of such motions simultaneously with an answer, as was done here, and that very filing puts the plaintiff on notice that the defendant is not waiving its right to assert the motions.

We move then to the central issue, which is whether § 74 of the New York Civil Rights Law provides an absolute defense to West. Section 74 provides in pertinent part:

> "A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published."

Upon its face the statute confers an absolute immunity, regardless of proof of malice or negligence, upon any person who publishes a "fair and true report" of a judicial opinion. The purpose of the statute in part is to implement the public policy in favor of encouraging publication and dissemination of judicial decisions and proceedings as being in the public interest. *See Lowenschuss* v. *West Publishing Co.*, 542 F.2d 180, 185-86 (3rd Cir. 1976); *Garfield* v. *Palmieri*, 297 F.2d 526, 527 (2d Cir.), *cert. denied*, 369 U.S. 871 (1962). *See also* the concurring and dissenting opinion of Justices Mollen and Titone in *Gurda* v. *Orange County Publications Div. of Ottaway Newspapers, Inc.*, 81 A.D.2d 120, 439 N.Y.S.2d 417 (2d Dept. 1981), which on appeal was adopted by the New York Court of Appeals as the basis for its reversal, 56 N.Y.S.2d 705, 436 N.E.2d 1326, 451 N.Y.S.2d 724 (1982). They stated:

> "The purpose of providing immunity to fair and true reports of judicial proceedings is said to be to encourage the dissemination of information concerning the judicial branch of government and thereby to serve the public interest 'in having proceedings of courts of justice public, not secret, for the greater security thus given for the proper administration of justice.' (*Lee* v. *Brooklyn Union Pub. Co.*, 209 N.Y. 245, 248, 103 N.E. 155, see, also, *Shiles* v. *News Syndicate Co.*, 27 N.Y.2d 9, 14, 313 N.Y.S.2d 104,

261 N.E.2d 251)." 81 A.D.2d at 131, 439 N.Y.S.2d at 423-24.

Since West's Advance Sheet publication of Judge Friedmann's opinion reproduced it precisely as written by the judge, it clearly constituted a "fair and true report" within the meaning of § 74.

Beary, relying on the 42-year-old decision of the New York Court of Appeals in *Murray* v. *Brancato*, 290 N.Y. 52, 48 N.E.2d 257 (1943), contends that the immunity granted by § 74 extends only to the "official" reporter of judicial decisions, in this case the New York State Reporter, and not to West, which is an unofficial reporter. In *Brancato*, a 4-3 decision, the court held that a New York state judge, while absolutely privileged when he writes an opinion and sends it to the official reporter, has only a qualified privilege, defeasible upon proof of actual malice, when he sends it to West, an unofficial reporter. The majority, however, declined to rule on whether § 74 (then § 1907 of the N.Y. Code of Civil Procedure and § 337 of the N.Y. Civil Practice Act), conferred absolute immunity on the publisher of a fair and true report of judicial proceedings, pointing out that there "may be doubt too whether the statute is intended to apply to the publication *by a judge* of an opinion written by himself," 290 N.Y. at 59, 48 N.E.2d at 260 (emphasis supplied), and that in any event the statutory question could not be considered because it had not been pleaded as a defense.

Our review of the decisional law since *Brancato* was decided satisfies us beyond any serious question that, whatever doubts may have existed in 1943, § 74 grants absolute immunity to the publisher of a true report of a New York state court judicial opinion, whether the re-

porter is classified as "official" or "unofficial." *See Holy Spirit Ass'n for Unification of World Christianity* v. *New York Times Co.*, 49 N.Y.2d 63, 399 N.E.2d 1185, 424 N.Y.S.2d 165 (1979); *Gurda* v. *Orange County Publications Div. of Ottaway Newspapers Inc.*, *supra*; *Nemerover* v. *Held*, 54 A.D.2d 561, 387 N.Y.S.2d 14 (2nd Dept. 1976) ("[D]efendants were absolutely privileged in publishing the transcript of the September 20, 1974 proceeding (see Civil Rights Law, § 74)."); *see also Lowenschuss* v. *West Publishing Co.*, *supra*; *Garfield* v. *Palmieri*, *supra*.[1]

Beary further argues that West is not entitled to § 74 immunity because it received the *Estate Roofing Co.* opinion directly from Judge Friedmann rather than from the official New York State Reporter. We disagree. For reasons already stated, since the published West report was "fair and true" the route by which it reached West is immaterial. Secondly, the affidavit of Arnold O. Ginnow, West's Vice-President and Editor-in-Chief, reveals that the *Estates Roofing Co.* opinion received by West bore the number "3990" on the last page, which is the number assigned by the official New York State Reporter to the opinion, showing that it was received from the latter. Despite his contrary claims, Beary has neither come forward with evidence supporting them or refuting the Ginnow affidavit, as required by Fed. R. Civ. P. 56(e), nor sought discovery under Fed. R. Civ. P. 56(f).

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[1] Minnesota, where West's reports are published, likewise grants an absolute privilege to reports of judicial proceedings. Minn. Stat. Ann. § 609.765, subdiv. 3(4); *Schuster* v. *U.S. News and World Report, Inc.*, 602 F.2d 850, 854 (8th Cir. 1979).

The judgment of the district court is affirmed. In view of the complete frivolousness of this appeal we award to the appellee double costs and $1,000 damages against appellant pursuant to F.R.A.P. 38. *See also* 28 U.S.C. §§ 1912, 1927.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the twenty-third day of May, one thousand nine hundred and eighty-five.

Present:

Hon. Walter R. Mansfield,

Hon. Amalya L. Kearse,

Hon. George C. Pratt,

Circuit Judges,

- - - - - - - - - - - - - - - -x

PATRICK BEARY,

Plaintiff-Appellant,

v.

Docket No. 84-7965

WEST PUBLISHING COMPANY,

Defendant-Appellee,

- - - - - - - - - - - - - - - -x

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern

District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the JUDGMENT and ORDER of said District Court be and it hereby is affirmed with an award to the appellee of double costs and $1000- damages against appellant pursuant to F.R.A.P. 38, in accordance with the opinion of this court.

ELAINE B. GOLDSMITH

By: Edward J. Guardaro
Edward J. Guardaro
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - -x
PATRICK BEARY,

Plaintiff,

Index No.
CV-84-3219

-against-

WEST PUBLISHING COMPANY,

ORDER AND JUDGMENT OF DISMISSAL

Defendant,
- - - - - - - - - - - - - - - -x

WHEREAS this action came on for hearing before this Court, the Honorable I. Leo Glasser, District Judge presiding, and the issues having been duly heard and the court having duly rendered its decision thereon,

IT IS ORDERED, ADJUDGED and DECREED that this action be and the same hereby is dismissed pursuant to Rule 12 F.R.C.P. for failure to state a claim upon which relief may be granted, and it is further

ORDERED, ADJUDGED and DECREED that summary judgment dismissing the complaint pursuant to F.R.C.P. 56 is hereby awarded in favor of defendant, and it is further

ADJUDGED and DECREED that this action is dismissed on the merits with prejudice.

Dated: Brooklyn, New York
Oct. 31st, 1984

SO ORDERED:

I. Leo Glasser
U.S.D.J.